MILITARY LAW — A STUDY IN COMPARATIVE LAW

I

A GRANITE boulder lies in a fertile plain underlaid by limestone. To the passer-by it is merely a rock. To the tiller of the soil it is merely an obstacle. Its existence is taken for granted and its presence needs no explanation. The embryonic scientist who has advanced far enough in his studies to know granite from limestone and to know that they are not ordinarily associated *in situ*, recognizes in the boulder an alien, an intruder. He does not know whence it came or how it reached its present location, but he realizes that its position upon fertile soil in a limestone formation needs some explanation. This is the beginning of wisdom with reference to the granite intruder. The explanation which the scientist will give for the phenomenon depends upon the extent of his knowledge and upon his previous beliefs and opinions. In the early days of geology, Noah's Flood was a sort of first aid to the perplexed, and served as a solution of all sorts of puzzles. Our scientist may invoke this theory and assume that the boulder was washed from a remote outcrop by the great flood. At a later period and with wider knowledge, he may find that something more substantial than water is necessary to explain other phenomena which he has discovered; and he may believe that it was carried down from some Laurentian formation by some great ice movement. What further explanations scientists may offer us in the future are matters of conjecture. The starting point, however, is the recognition of the fact that the granite boulder came from some remote point and that its presence here needs an explanation of some sort.

In the last year and a half many of us who have been studying Anglo-American law have been attempting to teach military law. We have recognized at once that in many respects it is an alien. Its foreign character does not consist in its content.[1] As far as

[1] For a brief comparison of English Military Law with that of France, Germany, Russia and Italy, see J. E. R. Stephens, "English and Continental Military Codes," 5 JOURN. OF COMP. LEGIS. (N. S.), 244.

may be, considering the great difference between the organization of the Army and the organization of a peaceful industrial society, the content of military law is Anglo-American criminal law based primarily upon its Maryland form, as far as this is recognized and adopted in the District of Columbia.[2] Nor is the pro-

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[2] A MANUAL FOR COURTS-MARTIAL [U. S. Army] (corrected to April 15, 1917), paragraph 338 (3, *d*).

The common law in force in the District of Columbia is the common law of Maryland.

"We think, therefore, that if it be a common-law offence, committed in this county, it is within the jurisdiction of this Court, whose common-law jurisdiction is derived from the common law of Maryland, which was, by the cession of Maryland and the acceptance of Congress, under the provision in the Constitution of the United States, transferred from Maryland to the United States, with that remnant of State sovereignty, which, after the adoption of the Federal Constitution, was left to Maryland. All the State prerogative which Maryland enjoyed under the common law, which she adopted, so far as concerned the ceded territory, passed to the United States. All the power which Maryland had, by virtue of that common-law prerogative, to punish, by indictment, offenders against her sovereignty, and to protect that sovereignty, became vested in the United States; and authorized them to punish offenders against their sovereignty, and to protect that sovereignty by the same means, so far as regarded the territory ceded.

"We therefore think that, in regard to offences committed within this part of the district, the United States have a criminal common law, and that this Court has a criminal common-law jurisdiction." United States *v.* Watkins, 28 Fed. Cas. No. 16649, 3 Cranch C. C. (U. S.) 441, 452 (1829).

"As against the United States regarded as co-extensive with the Federal union of States and operating within the territorial limits of the States, it is undoubtedly true that there are no common law offences; for the jurisdiction there given to the United States by the Federal Constitution is distinctly and expressly restricted to the powers enumerated in the Constitution. But the statement was not intended to have application to the District of Columbia. The question as to the authority of the United States in this District is not what power has been conferred upon it, but rather what power has been inhibited to it. Subject to the limitations imposed by the Constitution itself and by the spirit of our free institutions, the United States have supreme and exclusive power over the District of Columbia, and they are not limited to the governmental powers in the Constitution specifically enumerated as defining their jurisdiction for the country at large. For the District of Columbia it is competent for the Congress of the United States to declare that the common law is to be regarded as in force, and even in the absence of express statutory enactment we should have to hold, in view of the circumstances, that the common law in its entirety, both in its civil and criminal branches, except in so far as it has been modified by statute or has been found repugnant to our conditions, is in force in the District of Columbia. But we are not left to implication in that regard.

"At the time of the cession of the Territory of Columbia by the State of Maryland to the Federal Union, its law, as well as that of the rest of the States, was the common law of England, both civil and criminal, so far as that common law was suited to our condition and was unaffected by statute. And with the common law the State of

cedure the point at which it differs from Anglo-American law.[3] It is true that neither grand jury nor indictment is necessary.[4] Charges are prepared under authority of an officer of competent rank without the approval of any independent body.[5] There is no trial by jury. The court-martial passes upon the facts.[6] The reviewing authority exercises a freedom in dealing with the findings [7] which is impossible in ordinary criminal law where the action of the grand jury and the verdict of the petit jury are both guaranteed by constitutional provisions. At the same time the procedure is not unlike that of ordinary criminal courts which try minor offenses in which neither indictment nor petit jury are required. If dignity and military form could be added to a police court, the procedure would not be unlike that of a court-martial.

The great difference between military law and our Anglo-American law is far deeper than this. While the content is borrowed in part from the common law and in part shaped by the needs of military service, while the procedure is a summary Anglo-American criminal procedure, without grand jury or petit jury,

Maryland had adopted a considerable part of the statute law of England. When by the act of February 27, 1801 (2 Stat. 103), the Congress of the United States finally accepted the cession and assumed jurisdiction over the ceded District, it was specifically provided 'that the laws of the State of Maryland, as they now (then) exist, shall be and continue in force in that part of the said District which was ceded by that State to the United States and by them accepted.'. This express enactment, if any such enactment was needed at all, was amply sufficient to continue in force and to perpetuate to the present day in the District of Columbia the common law of England as it existed in Maryland at that time, with all the existing statute legislation of the State and all the statute legislation of England that had been adopted by Maryland. And upon that theory of the law we have been conducting our affairs for nearly a hundred years. It is very true that much of the criminal branch of our common law has either become obsolete or has been obliterated by statutory enactment upon the same subject. Nevertheless, it is true that where it has not been repealed by express statutory provision, or modified by inconsistent legislation, or where it has not become obsolete or unsuited to our republican form of government, the common law of England in all its branches, both civil and criminal, remains to-day the law of the District of Columbia, and it has been repeatedly so held. See *United States* v. *Watkins*, 3 Cranch C. C. 441; *United States* v. *Marshall*, 6 Mackey, 34; *United States* v. *Hale*, 4 Cranch C. C. 83." De Forest *v.* United States, 11 App. D. C. 458, 465, 466 (1898).

[3] For a discussion of the history of the Court-Martial, see WINTHROP, MILITARY LAW AND PRECEDENTS, 2 ed., Chap. V.

[4] Fifth Amendment to Constitution of United States.

[5] MANUAL FOR COURTS-MARTIAL [U. S. Army] (corrected to April 15, 1917), paragraphs 62–64.

[6] *Ibid.*, paragraphs 294–304.

[7] *Ibid.*, paragraphs 369–400.

the great difference between military law and Anglo-American law is found in the form of each and in the method of growth.

To those who are familiar with Anglo-American law and Roman law and who have given any consideration to the form and to the method of growth of military law, what is to be said here upon this subject will be trite and commonplace. To those who are familiar with the form and the method of growth of Roman law it will be necessary only to point out the corresponding characteristics of military law. Those who have never considered the peculiarities of Roman law as to form and method of growth and who have considered military law as merely a special variant of Anglo-American criminal law, may have wondered at the great difference between the two latter systems of law upon these points. It is with the hope of arousing interest and securing coöperation in an investigation of this subject that the following suggestions are offered.

II

Beginning with the reign of Henry II the common law[8] has been what we call with our inaccurate nomenclature, unwritten law. It has been a judicial development of legal custom by technically trained tribunals aided by a technically trained bar. It is possible that popular custom was worked over by the courts from an early date and to a far greater extent than many writers upon Anglo-American law will admit. In any event, whatever the relative proportion of popular custom and judicial custom, it was not based on legislation. The royal constitutions and the statutes of Parliament have modified its development, sometimes aiding it, sometimes hindering it; but at no time did English law take the form of a legislative code as a basis for juristic development.

Roman law on the other hand, at the earliest known period of its development, took the form of a written code.[9] What other

[8] "Common law" is used here as the law of the King's courts. For convenience no account is taken of the relics of the older law that lingered in the local courts; or of the law of the courts which administered the Law Merchant.

[9] MUIRHEAD, HISTORICAL INTRODUCTION TO THE PRIVATE LAW OF ROME, 2 ed., Pt. II, Chap. II, §§ 21 *et seq.*, p. 94 *et seq.* MELVILLE, MANUAL OF THE PRINCIPLES OF ROMAN LAW, Pt. I, Chap. I, § 11, pp. 6–9. WALTON, HISTORICAL INTRODUCTION TO ROMAN LAW, 2 ed., Chap. XI. SALKOWSKI, INSTITUTES AND HISTORY OF ROMAN PRIVATE LAW (Whitfield's translation); Introduction, Pt. II, § 7, pp. 27, 28. SOHM,

codes preceded the Twelve Tables, and to what extent the priestly caste regarded their law as legislation rather than as a mass of principles, we have no means of knowing with any certainty. The Twelve Tables themselves were undoubtedly far from a complete statement of Roman law when they were enacted. They rather constituted a great reform statute. Cruel and harsh as many of its provisions seem to us, it undoubtedly was, in its day and generation, legislation intended to protect the weaker classes against the exactions of a military and a priestly aristocracy. At any rate, from an early period, the Roman law showed a strong tendency to reduce its principles to form and order; to embody them in what was practically legislation; and to base its subsequent development in part upon this legislation. Its future juristic growth was in part in the form of commentaries upon this early legislation; commentaries which gradually covered the original foundation with a mass of law under which the Twelve Tables were practically buried; but which nevertheless, in theory at least, rested upon them as their sole foundation. Along with this development was the constant tendency to resort to legislation for the purpose of affording systematic aid to the development of the law and for introducing new principles into the law. The Roman law did not regard a statute as an arbitrary rule made by an external power which had authority to give orders to the court; which the courts must obey as far as the specific order went; but formed no part of the living, growing law. On the contrary at Roman law a statute was a source of law from which new principles could be deduced and from which analogies could be drawn.[10] Subsequent legislation, in other words, was treated, like the original Twelve Tables, as a source of law for further comment, interpretation, and juristic growth.

The military law of England existed apparently from the out-

INSTITUTES OF ROMAN LAW (Ledlie's translation), 3 ed., Pt. I, Chap. I, § 11, p. 48 *et seq.* GIRARD, SHORT HISTORY OF ROMAN LAW (translated by Lefroy and Cameron), Chap. II, § 1, 1, p. 47 *et seq.* 1 CUQ, LES INSTITUTIONS JURIDIQUES DES ROMAINS, § 1, Bk. I, Chap. III (I), § 2, p. 28 *et seq.* CZYHLARZ, LEHRBUCH DER INSTITUTIONEN DES RÖMISCHEN RECHTES, § 7, p. 12. KUHLENBECK, ENTWICKLUNGSGESCHICHTE DES RÖMISCHEN RECHTS, Bk. II, Chap. 11, § 4, p. 152 *et seq.* ESMARCH, RÖMISCHE RECHTSGESCHICHTE, 3 ed., Bk. I, Chap. III, §§ 20–25. VOIGT, RÖMISCHE RECHTSGESCHICHTE, § 4.

[10] Roscoe Pound, "Common Law and Legislation," 21 HARV. L. REV. 383.

set, in the form of legislation, whether it was in writing or not, in the popular sense of the term.[11] By virtue of his prerogative, the King ordained the Articles of War for the Royal Army during the continuation of the war for which they were ordained. By a delegation of royal authority the commanders of armies from time to time proclaimed similar articles. Cromwell assumed this power as a part of the inherent power of the head of the English state. Legislation by Parliament proved necessary to supplement the royal prerogative in cases in which it was found necessary to impose restrictions and to inflict punishments which were in excess of the royal prerogative alone. The early English Army was a temporary force raised in each war for the continuation of that war and dissolving when the war had come to an end. When the Army had become a permanent national force, the Articles of War by which it was governed in England in time of peace were enacted by Parliament, while outside of England the royal prerogative was still sufficient to ordain Articles of War and to enforce them. The growth of the power of Parliament and the gradual disappearance of the personal authority of the King gradually led to legislation by Parliament which superseded, while it adopted, the Articles of War ordained by royal prerogative; although the prerogative was nominally exercised by the ministry long after the subordination of the King to Parliament had become thoroughly established. The usages and customs of the Army undoubtedly furnished much material for the content of the Articles of War but the constant tendency was to reduce them to definite form and to promulgate them as royal or parliamentary Articles of War.

With the outbreak of the American Revolution the English Articles of War, with slight modifications, were enacted by the Congresses and Assemblies of the different colonies and by the Continental Congress. The Congress of the United States under the Constitution of 1787 has reënacted these Articles from time to time with various additions and amendments and at present

[11] For the scope and extent of Military Law in England and the relation between Military Law and Martial Law see W. S. Holdsworth, "Martial Law Historically Considered," 18 L. QUART. REV. 117; H. Erle Richards, "Martial Law," 18 L. QUART. REV. 133; Cyril Dodd, "The Case of Marais," 18 L. QUART. REV. 143, and Frederick Pollock, "What is Martial Law?" 18 L. QUART. REV. 152, in which however, special emphasis is laid on the nature of Martial Law.

they form a part of the Federal Statutes, being section 1342 of the Revised Statutes of the United States. From the time of the earliest royal Articles of War down to the Articles of War which were enacted by Congress in their present form on August 29, 1916, and which, with the exception of certain specified Articles, took effect on March 1, 1917, the constant tendency has been to express military law in the form of legislation. Customs have been incorporated in legislation. New problems which arose from time to time under changed conditions have been solved, omissions and gaps in the existing law have been filled, and the elimination of provisions which had become obsolete have all been made, for the most part, by legislation. Military law in its present form consists, to a large extent, of the Articles of War and of the commentaries written upon these Articles by the different authorities upon this subject. In this respect the development of military law has been far more like the development of Roman law than like the development of English law.

It must be admitted that the development of criminal law in the United States and in some of the states of the Union has been, to a large extent, statutory. This is a peculiarity due to constitutional and statutory provision, however, and is a rather accidental phenomenon. While some states have no substantive common law of crimes, it is because their legislatures have shown an intention to make legislation exclusive on the subject of crimes; although even in such states the legislatures may forbid common-law crimes by name and thus make them statutory crimes without any enumeration of their elements.[12] While the United States courts have no substantive criminal jurisdiction over common-law crimes, this grows out of the fact that the inferior federal courts are limited to such jurisdiction as is conferred upon them by Federal Statute.[13] Congress may forbid common-law crimes by name and thus make them statutory crimes without any enumeration of their elements.[14] This may in part account for the

[12] Such as assault, Baker *v.* State, 12 Ohio St. 214 (1861); disturbance of the public peace, Stewart *v.* State, 4 Okla. Crim. 564, 109 Pac. 243 (1910); and nuisances, State *v.* De Wolfe, 67 Neb. 321, 93 N. W. 222 (1903).

[13] United States *v.* Hudson, 7 Cranch (U. S.) 32 (1812); Manchester *v.* Massachusetts, 139 U. S. 240 (1890); United States *v.* Eaton, 144 U. S. 677 (1892).

[14] Such as murder and robbery, United States *v.* Palmer, 3 Wheat. (U. S.) 610 (1818).

form that military law has assumed in the United States. On the other hand military law assumed the form of a code in England at a time when criminal law was being developed by the King's courts as a law of judicial precedent. From the outset, the two systems, even when unchecked by constitutional restrictions or by statutory provisions, tended to assume different forms.

III

The common law was, from the outset, a law of judicial precedent, that is, a system of law in which a decision of the court was regarded as declaring the law and as fixing it, within more or less vague limits, for the purpose of applying it to similar facts as they might arise in the future.[15] Attention has been called to the fact that in the earlier year books no specific citation is made to prior decisions of the court.[16] The court speaks as one having authority. This is undoubtedly correct but it does not necessarily mean that prior decisions were not regarded as precedents. To this day, a busy trial judge who has decided groups of similar questions on many different occasions and who has not been reversed, may speak as one having authority and may follow his earlier decisions as precedents without citing them specifically. The courts whose opinions are reported in the year books were trial courts. The memoranda of cases which make up the year books whether noted down by students, by practicing attorneys or by court officials, were hasty memoranda taken down at the time, while the trial was proceeding. In all probability the reporter had scant opportunity to note a citation if one were made. At that time cases could be studied only from the official rolls and in the memoranda of the year books. In both cases, they were in manuscript. Copies of the year books were few and it

[15] On this question see, A. H. F. Lefroy, "Judge-Made Law," 20 L. QUART. REV. 399. A. H. F. Lefroy, "The Basis of Case-Law," 22 L. QUART. REV. 293, 416. Alexander Lincoln, "The Relation of Judicial Decisions to the Law," 21 HARV. L. REV. 120. William B. Hornblower, "A Century of 'Judge-Made' Law," 7 COL. L. REV. 453. M. C. Klingelsmith, "The Continuity of Case Law," 58 PA. L. REV. 399.

[16] See John Chipman Gray, "Judicial Precedents. A Short Study in Comparative Jurisprudence," 9 HARV. L. REV. 27. For a discussion of the nature of the year books, see W. S. Holdsworth, "The Year Books," 22 L. QUART. REV. 266, 360.

was very natural that specific citations should not be made. We find correspondingly few references to the textbooks which appear to have been the standard books and to have shaped the entire development of the law. Furthermore, at the outset, precedents were few. Nearly every case which was thought worthy of a memorandum in the year books was one of first impression. Cases in which well-known principles were applied to combinations of facts with which the court and bar had become familiar would probably not be noted by the reporter. The year books are rather books of selected cases. In all probability there was no attempt to report all the opinions which were pronounced by the judges during the period covered by each of the year books. That precedents were looked upon as binding in the middle of the thirteenth century is evident, when we consider the way in which Bracton wrote that part of his book which is based upon English law and which is not more or less a copy or adaptation of Azo's Version of the Roman Law. Having no book of selected cases, Bracton proceeded to make one; and out of this book of selected cases prepared for his own use, he took the material upon which he based the text of his great work, "Tractatus de Legibus et Consuetudinibus Angliae." It is likely that specific precedents were actually relied upon from a very early period in the King's courts, whether cited in the opinion or not. Eventually the custom arose of citing in the court's opinion the specific decisions upon which it relied. Anglo-American law grows to a great extent by the accumulation of precedents, guided by the criticism and discussion of text-writers; and unvexed and unaided by legislation. The courts are constantly comparing and analyzing the earlier cases. The early explanations, theories, and reasons of the law as set forth in judicial decisions may be followed, amplified or rejected in succeeding cases, but they are always the basis of discussion in testing the validity of recognized principles or in applying them to new facts. It is these opinions of the judges which are gathered by the subsequent text-writers as Bracton gathered them, except that the later text writers had the opinions of the courts in the year books and were not forced to rely upon the Plea Rolls. These decisions are compared and analyzed by the text-writers and from them are deduced the principles set forth in the textbooks, which in turn

exercise more or less influence upon the subsequent current of judicial decision.[17]

Roman law was not a law of judicial precedent. In the classic period of the Roman law the commentators make no reference to the decisions of the court; that is, to the decisions of the prætor and the *judex*. They are not noticed, even for hostile criticism. They have no effect of any sort upon the development of the Roman law.

The reason for this great difference in the organs of legal development between these two systems of law lies in the fact that Anglo-American judges are trained lawyers and that they are considered as the oracles of the law, at least for each case which is submitted for adjudication. The decision of a judge is therefore the law of that case and as far as the case is a precedent, subject to the chance of reversal by a higher court or of overruling by a coördinate court, it helps to declare and to fix the law for future cases. Arguments of counsel and citations of authority are advisory only. In Roman law on the other hand, the prætor was not a trained lawyer except by a mere accident. He was not supposed to have any official knowledge of the law other than to grant or to deny the *formula* to the plaintiff or the *exceptio* to the defendant. The prætor presided over the case and referred it to the *judex* to ascertain the facts. The *judex*, like the prætor, was not supposed to have any official knowledge of the law. Any legal question of any difficulty was decided by the opinion of the *jurisconsultus*. This method of administering justice which seems so peculiar to the Anglo-American lawyer is due to the fact that the *jus civile* originally was one of the mysteries of the college of pontiffs, the priestly caste. The growing power of the plebeians and the downfall of the power of the early aristocracy of Rome reacted upon the position of the pontiffs and the exclusive knowledge of the law which was one of the great sources of their authority was wrested from them. By that time, however, it had become well settled that neither prætor nor *judex* was supposed to know the law and that legal questions were to be de-

[17] For a discussion of the break-down of the law of precedent under present conditions, see Roscoe Pound, "Law in Books and Law in Action," 44 AM. L. REV. 12, and John S. Sheppard, Jr., "The Decadence of the System of Precedent," 24 HARV. L. REV. 298.

termined by the advice of men learned in the law. Accordingly, as the class of *jurisconsulti* succeeded to the college of pontiffs as the trained lawyers of Rome, the opinion or *responsum* of a *jurisconsultus* was the means of determining the legal questions involved in a case which was submitted for adjudication. The opinions or *responsa* of a learned *jurisconsultus* were collected as we collect decisions of courts in Anglo-American law and they were the basis of subsequent analysis, discussion, and comment.[18]

[18] "The beginnings of professional knowledge and administration of the law are found with the *pontifices*. As knowing and guarding the calendar and the law of the *sacra*, which had great influence over the secular law in mercantile transactions and in procedure, they had brought this as well within the sphere of their activities. The knowledge of the law which grew up within the *collegium* flourished there and became a sort of secret science of the *pontifices*, by means of which the position of power of the patricians was greatly strengthened. Any one who wished to conclude juristic acts or to institute legal proceedings did well to have the *pontifices* point out to him the right way. This condition of affairs was changed only in the fifth century by the publication of the calendar, which was made in the year 450 A. U. C. (304 B. C.) by *Cn.* Flavius, a secretary of the *pontifex* Appius Claudius; and by the publication of the forms of actions which had been drawn up by the *pontifices* (*jus Flavianum*), as well as by the fact that a half century later the plebeians, too, were admitted to the college of the *pontifices*. The boast is made concerning the first plebeian *pontifex maximus*, Tiberius Coruncanius that he *primus publice jus vicile professus est*. By this means the juristic tradition of the *pontifices*, which had been collected up to this time, became generally accessible; and thus began an independent jurisprudence, which soon developed in great profusion.

"The activity of the jurists in Rome was from the beginning a predominately practical one. Apart from their coöperation in juristic acts (*cavere*), it was manifested chiefly in the rendering of legal opinions (*responsa*) on concrete practical cases. The weight of these opinions was determined according to their external basic principles, and the standing of the jurists by which they were rendered. They had no inherent compulsory authority over the *judex*. Frequently in legal proceedings opinion was opposed to opinion. This led in court to a conflict of opinions (*disputatio fori*), which was eventually ended by the fact that one view would compel a continued recognition in practice, and would thereby become law by usage. Therefore these *responsa* possessed no statutory force as yet.

"They did not attain statutory force until the period of the Empire, and, indeed, under Augustus through the decree that the *responsa* should hereafter be bestowed by virtue of Imperial authority. This arrangement was kept up by the later Emperors; and the *jus respondendi*, which they exercised themselves by granting their rescripts, was bestowed by them as a special favor upon prominent jurists. With reference to the form of these *responsa*, it was provided that they must be given in writing and must be sealed. Since such a *responsum* was now given under Imperial authority, it was binding upon the judge, unless a contradictory opinion of another jurist, who was likewise authorized, was produced. In the beginning this authoritative validity belonged only to the *responsum* as such; and for this reason it was applied to the individual proceedings only for which the *responsum* was granted. Soon this authoritative validity was granted to opinions which were no longer at hand in their official

A cursory examination of the views of the different historians of Roman law will show a number of minor differences of opinion as to the position of the *jurisconsultus* at Roman law. Passing allusions in Roman literature show us that *responsa* were rendered, that they were collected and that they formed the basis of comment and discussion. Of definite statements in legal writings concerning the position of the *jurisconsultus* we have only two texts, those of Gaius [19] and of Pomponius;[20] for the text from

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form, but were found in collections of *responsa;* and finally it was extended to the views of these authorized jurists, which were expressed in other writings of theirs. This usage was confirmed through a rescript of Hadrian, which provided that if there was no divergence of opinion among the authorized jurists concerning a question, this so-called *jus receptum* should be as binding as a *lex;* and that on the other hand in cases of the so-called *jus controversum,* that is to say, in questions concerning which the jurists held diverging views the *judex* was to decide as he held to be right." CZYHLARZ, LEHRBUCH DER INSTITUTIONEN DES RÖMISCHEN RECHTS, § 11.

On this question see also, MUIRHEAD, HISTORICAL INTRODUCTION TO THE PRIVATE LAW OF ROME, 2 ed., Pt. IV, Chap. I, § 59, pp. 291–93. BUCKLAND'S ELEMENTARY PRINCIPLES OF ROMAN PRIVATE LAW, § 6, p. 11. MELVILLE, MANUAL OF THE PRINCIPLES OF ROMAN LAW, Pt. I, Chap. I, § VIII, p. 35 *et seq.* WALTON, HISTORICAL INTRODUCTION TO ROMAN LAW, 2 ed., Chap. XXIII. LEAGE, ROMAN PRIVATE LAW, 22 *et seq.* SALKOWSKI, INSTITUTES AND HISTORY OF ROMAN PRIVATE LAW (Whitfield's translation), Introduction, Pt. II, § 7, pp. 36–39. SOHM, INSTITUTES OF ROMAN LAW (Ledlie's translation, 3 ed.), Pt. I, Chap. II, § 18, p. 92 *et seq.* GIRARD, SHORT HISTORY OF ROMAN LAW (translated by Lefroy and Cameron), Chap. III, § 1, 2, VI, p. 142 *et seq.* 1 CUQ, LES INSTITUTIONS JURIDIQUES DES ROMAINS, § 2, Bk. I, Chap. II, p. 16 *et seq.* 2 CUQ, LES INSTITUTIONS JURISDIQUES DES ROMAINS, Bk. I, Chap. II (VI), p. 35 *et seq.* KUHLENBECK, ENTWICKLUNGSGESCHICHTE DES RÖMISCHEN RECHTS, Bk. III, Chap. I, § 3, p. 305 *et seq.* ESMARCH, RÖMISCHE RECHTSGESCHICHTE, 3 ed., Bk. II, Chap. III, §§ 88–92.

For pontifical interpretation see also ESMARCH, RÖMISCHE RECHTSGESCHICHTE, 3 ed., Bk. I, Chap. V, §§ 41–45; 1 CUQ, LES INSTITUTIONS JURIDIQUES DES ROMAINS, § 1, Bk. I, Chap. II (III), p. 24 *et seq.*

For the effect of *responsa* in the time of Augustus, see also WALTON, HISTORICAL INTRODUCTION TO ROMAN LAW, 2 ed., Chap. XXIV, pp. 280, 281. SALKOWSKI, INSTITUTES AND HISTORY OF ROMAN PRIVATE LAW (Whitfield's translation), Introduction, Pt. II, § 8, V, pp. 45, 46.

For the effect of *responsa* in the time of Hadrian, see also 1 CUQ, LES INSTITUTIONS JURIDIQUES DES ROMAINS, § 2, Bk. I, Chap. II (III), § 3.

[19] "The responses of the learned in the law are the expressed views and opinions of those to whom license has been given to expound the laws; and if the opinions of all these are in accord, that which they so hold has the force of a *lex;* but if they are not in accord the *judex* is at liberty to follow which opinion he pleases, as is stated in a rescript of the late emperor Hadrian." GAIUS, I, § 7 (translated by Abdy and Walker.)

[20] "Massurius Sabinus was a member of the equestrian order, and was the first to give opinions in the public interest (*publice*); the fact being that after this privilege had come to be given, it was allowed to him by Tiberius Caesar. It may be observed

Justinian's Institutes[21] is a reproduction of the text of Gaius with slight modifications. Upon these two texts there has been a considerable amount of comment and discussion; and by giving emphasis to one phrase or to another, different historians have reached different views. It must be admitted in advance that we cannot be sure that we have either text in its original form and that it is doubtful how far each text-writer was incorporating positive legislation into his statement of the law. The point upon which this divergence of view has arisen is as to the official position of the *jurisconsultus* and as to the binding effect of his *responsa*. The college of pontiffs undoubtedly possessed an official position as the custodians and oracles of the law. Apparently their statements of the law were binding upon the officials to whom such statements were made, including the *judex*. When this monopoly was wrested from them and when men who were not members of the college of pontiffs acquired knowledge of the law and gave *responsa*, this knowledge and authority for a long time remained in the wealthier classes. A *jurisconsultus* was not paid by his clients. His services were gratuitous. They were rendered in part as a performance of a public duty, and in part for the purpose of obtaining political influence. It is thought worthy of note that Sabinus was not a man of ample means and that he was maintained to a great extent by his pupils. The

in passing that before the days of Augustus the right of delivering opinions in the public interest was not granted by the head of the state, but any persons who felt confidence in their own learning gave answers to such as consulted them; moreover they did not always give their answers under seal; they very often wrote to the judge themselves, or called upon those who consulted them to testify to the opinions they gave. The Divine Augustus was the first to lay down, in order to ensure greater authority to the law, that the jurisconsult might deliver his answer in pursuance of an authorization given by himself; and from that time such an authorization was asked for as a favour. It was in consequence of that that our excellent Emperor Hadrian, on receiving a request from some lawyers of prætorian rank for leave to give legal opinions, answered the applicants that this privilege was not usually asked for but granted [or that there was no leave asked for this practice, it was simply carried out], consequently, if any one were confident of his powers, he (the Emperor) would be much pleased to find that he took steps to qualify himself for delivering opinions to the citizens." POMPONIUS, D. I, 2, 48, 49 (translated by Monro.)

[21] "The answers of those learned in the law are the opinions and views of persons authorized to determine and expound the law; for it was of old provided that certain persons should publicly interpret the laws, who were called jurisconsults, and whom the Emperor privileged to give formal answers. If they were unanimous the judge was forbidden by imperial constitution to depart from their opinion, so great was its authority." INSTITUTES, I, 2, 8 (translated by Moyle.)

jurisconsulti, up to the reign of Augustus, had apparently the right to give *responsa*, but a *responsum* would not be binding upon a *judex* by positive law. Were these *responsa* regarded as practically binding even though they had no formal legal sanction? What was the object and effect of the legislation of Augustus which is referred to by Pomponius? Was Augustus attempting to give a monopoly to the *jurisconsulti* who had obtained authority from himself, to render opinions which should be binding upon the *judex;* or was he trying to strengthen the position of the *jurisconsulti* by compelling the *judex* to follow the opinions of those to whom such authority was given? The text of Pomponius reads as if such authority were permissive only; as if no attempt was made to prevent *jurisconsulti* who had not obtained such authority from giving *responsa*. Was the *jus respondendi* given to a very few of the *jurisconsulti* or was it given to any one who had demonstrated an adequate knowledge of the law? Between the legislation of Augustus and the legislation of Hadrian was the *judex* bound to follow the *responsum* of a *jurisconsultus* to whom the Emperor had given authority to give *responsa*? What was the object of the legislation of Hadrian? Was it to make the *responsum* of the authorized *jurisconsultus* binding upon the *judex* in that particular case; or was it intended to make all *responsa* of all authorized *jurisconsulti* precedents which must be followed by the *judex* except when there was a conflict of authority? If we select the proper expressions of opinion from the different historians, we can see the *jurisconsultus* on the one hand as devoid of official position and of power to give *responsa* which should be binding upon the *judex* down to the reign of Hadrian, and we can then see that his *responsa* are binding only in the particular case in which they are given. By a similar selection of other expressions of opinion we can see a *jurisconsultus* who from the time of Augustus had power, if authorized by the Emperor, to give *responsa* which were binding upon the *judex;* and who had power from the time of Hadrian to give *responsa* which should amount to precedents and which should be binding in all future cases.[22] If the *jurisconsultus* could render *responsa* to the

[22] For the final breakdown of *responsa* see Erwin Grueber "The Decline of Roman Jurisprudence," 7 L. QUART. REV. 70.

For legislation which attempted to fix absolutely the rank and authority of juristic

judex, only if the *jurisconsultus* had been authorized by the Emperor to render such *responsa*, and if their *responsa* thus rendered were absolutely binding, the position of the *jurisconsultus* at Roman law would be almost identical with that of the Judge-Advocate-General in military law.

Whatever these differences of detail, the actual difference between Roman law and Anglo-American law on this point is rather apparent than real. While they differed sharply upon their theories as to the possessor of technical legal knowledge, they agreed

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writings generally, see MUIRHEAD, HISTORICAL INTRODUCTION TO THE PRIVATE LAW OF ROME, 2 ed., Pt. V, Chap. I, § 78, p. 363–65. MELVILLE, MANUEL OF THE PRINCIPLES OF ROMAN LAW, 2 ed., Pt. I, Chap. I, § VIII, pp. 42, 43. WALTON, HISTORICAL INTRODUCTION TO ROMAN LAW, 8, Chap. XXVI, pp. 293–95. SALKOWSKI, INSTITUTES AND HISTORY OF ROMAN PRIVATE LAW (Whitfield's translation), Introduction, Pt. II, § 9, p. 58. SOHM, INSTITUTES OF ROMAN LAW (Ledlie's translation), 3 ed., Pt. I, Chap. II, § 21, pp. 118, 119. GIRARD, SHORT HISTORY OF ROMAN LAW (translated by Lefroy and Cameron), Chap. III, §§ II (II), pp. 152, 153. KUHLENBECK, ENTWICKLUNGSGESCHICHTE DES RÖMISCHEN RECHTS, Bk. III, Chap. II, § 4, p. 350.

"By the third century there begins a decline of Roman jurisprudence, which suffers a rapid decay after Diocletian. Scientific productive activity died; the responses of the jurists ceased; the development of the law took place along the path of Imperial legislation only. Still the writings of the great past, which had been handed down, preserved their binding force. The lack of scientific capacity and the great bulk of the juristic literature caused an uncertainty in practice as to its application. What writings were in force? Those of the authorized jurists. But how was one to know by this time whether this or that jurist of his own time (centuries ago) had acquired the *jus respondendi*? This and other similar difficulties were the cause of a statute of Theodosius II. and Valentinian III., of the year 426, by which the sphere of the valid juristic writings was delimited, and at the same time their validity was regulated according to external facts, in accordance with the notions of the time. Through this so-called law of citations, the validity of the most current writings, that is to say, those of Papinianus, Paulus, Gaius, Ulpianus and Modestinus were confirmed as pre-eminent; but with the exception of the *notæ* of Paul and Ulpian to Papinian, which Constantine had already prohibited. These *notæ* were to remain prohibited in the future as well. Since Gaius had had no *jus respondendi* in his time, this was given to him by a sort of *ex post facto* confirmation, since his writings were nevertheless used in the courts. In addition to these five jurists, statutory validity was to be given to all the works of every other jurist, to which a reference was made in the works of one of the five thus named. To go into details, the process was regulated as follows. If all these jurists were of the same opinion with reference to a question, this was to be binding like a statute. In case of a divergence of opinion, on the other hand, that view should prevail for which a majority of the jurists had declared themselves. In case of an equal division of authority, that view was to prevail which Papinian (*excellentis ingenii vir*) had expressed. In case he had not expressed himself concerning this question, the judge was finally to decide according to his own views." CZYHLARZ, LEHRBUCH DER INSTITUTIONEN DES RÖMISCHEN RECHTES, § 11. See, also, Roscoe Pound, "Mechanical Jurisprudence," 8 COL. L. REV. 605.

that it was the opinions of those who possess technical legal knowledge and whose opinions actually determined adjudicated cases that were to be the basis of further growth of the law.

Military law like Roman law, is not a law of judicial precedent. The members of a court-martial are not supposed to know the law as technical experts. If they possess such knowledge it is personal and not official. Technical and expert knowledge of the law is supposed to be possessed by the judge-advocate. In England the judge-advocate who appears at a court-martial represents the Judge-Advocate-General and is required to maintain an entirely impartial position as the legal adviser of all the parties connected with the trial, as well as the legal adviser of the court. While the court has power to disregard his advice, such action is highly inadvisable. The court should be guided by the opinions of the judge-advocate on any questions of law or procedure that may arise during the trial and it must consider the grave consequences which may result from a disregard of legal advice given to them by the judge-advocate.[23] The judge-advocate is not the prosecutor and his position as an impartial adviser is not complicated by the fact that he is officially charged with the duty of conducting the prosecution.

In the United States the position of the trial judge-advocate is somewhat ambiguous. He has charge of the prosecution. He is bound to inform the prisoner of his legal rights if he is not represented by counsel. He may call the attention of the court-martial to apparent irregularities in proceedings and he is to act as the legal adviser of the court so far as to give his opinion upon a point of law arising during the trial when asked for by the court, but not otherwise.[24] Under both English and American theories as to the position of the judge-advocate, the Judge-Advocate-General, at least, is the oracle of the law. He occupies the position which originally the college of pontiffs and subsequently the *jurisconsulti* occupied in Roman law, rather than the position which the prosecuting attorney occupies in the ordinary administration of criminal justice. While provision might be made for preserving the opinions of every judge-advocate, at every impor-

[23] PRATT, MILITARY LAW, 19 ed., § 73, p. 62.

[24] MANUAL FOR COURTS-MARTIAL [U. S. Army] (corrected to April 15, 1917), paragraphs 95–103.

tant court-martial, this is not done as a matter of fact. The opinions of the Judge-Advocate-General are preserved but they are not published. They are available in the form of a digest in which a summary of abstract rules of law is generally given with such lack of detailed statement of fact, in many cases, as to prevent the application of the abstract principle from being discernible readily. This digest is the collection of *responsa* of military law and as such it has been commented upon by the different text-writers on military law. These opinions as a rule are treated as finalities except where modified subsequently by statute.

IV

At Anglo-American law it has become settled doctrine that the court has power only to decide each case as it is submitted for adjudication. Judicial power is distinguished from legislative power and the declaration of law for the particular case is regarded as judicial power which can be exercised by the court. While the declaration of law in advance for similar cases which may arise in the future, is now regarded as legislative power which is outside of the jurisdiction of the court, at an earlier period it once seemed as if a different view of this matter might be taken. The year books occasionally show us judges who feel free to make official declarations of law from the bench as well as to draft statutes. In the case of doubtful or disputed points, conferences of judges were occasionally held and resolutions were adopted which were intended not merely to decide the specific case but to lay down broad and comprehensive principles by which analogous cases could be decided. Coke seems to have felt that as a common-law judge he had authority to take part in making such resolutions. When Coke's rival and enemy, Bacon was made Lord Keeper of the Great Seal of England and took his place in Chancery, he made an address to the bar in which he avowedly compared himself to a Roman prætor as the officer who had the greatest affinity to the jurisdiction of the Chancellor; and in which he announced, like the prætor, how he would use his jurisdiction.[25]

[25] 2 WORKS OF FRANCIS BACON, 1844 ed., 471, *et seq.* 1827 ed., Vol. 7, 244 *et seq.* See also KERLY, HISTORICAL SKETCH OF THE EQUITABLE JURISDICTION OF CHANCERY, 102 *et seq.* U. M. Rose, "Coke and Bacon: The Conservative Lawyer, and the Law

His declaration to a large extent dealt with procedure and practice rather than substantive law; but equity has persisted even more than common law in regarding substantive law as a sort of a by-product of procedure and practice. In a more definite and formal way Bacon made and published ordinances for the better and more regular administration of justice in the Chancery, which were to be duly observed, saving the prerogative of the court.[26] How far Bacon could have gone in developing equity by his seventeenth-century views of the prætor's edict if he had continued to occupy his office for a sufficient length of time, must always be a matter of conjecture. His fall, to which his virtues contributed perhaps more than his vices, prevented him from developing his plans. Subsequent chancellors have felt free to make rules of procedure but no one has revived his attempt to publish an edict upon entering into office in which should be set forth the manner in which he proposed to use his jurisdiction. Two remnants of the practice of framing resolutions and deciding cases in advance remain. Occasionally as a matter of convenience, coördinate judges who have differed on matters of procedure of substantive law meet in consultation, and attempt to adopt a common basis of decision, so as to prevent the misfortune of having two similar cases decided in different ways because of the divergent personal views of the judges before whom the questions may happen to arise. Under some constitutions, provisions have been made for requiring advisory opinions of the supreme court upon specific points of law before litigation actually arises.[27] This latter method of declaring the law is so at variance with our common-law ideas that the attitude of the courts toward this addition to their powers is decidedly hostile.

In Rome the downfall of the kings left the power of the government and administration essentially royal in its nature, but divided among the consuls and the other officers who were from time to time created as successive lines of intrenchment whenever the old aristocracy was forced to open any one of the exist-

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Reformer." 31 AMERICAN L. REV. 1, and E. M. in LAW TIMES (London), "Francis Bacon: Philosopher, Law Reformer, Lord Chancellor," 40 AMERICAN L. REV. 28.

[26] 2 WORKS OF FRANCIS BACON, 1844 ed., 479 *et seq.*

[27] F. Granville Munson, "The Decision of Moot Cases by Courts of Law," 9 COL. L. REV. 667.

ing offices to the plebeians. The prætor to whom the administration of justice was committed possessed therefore a portion of the *imperium;* limited, it is true, but pure and unalloyed as far as it went. By virtue of this *imperium*, on taking office he published an edict in which he set forth the actions which he would allow.[28] While each prætor probably had power to issue an edict

[28] "The administration of justice was vested in Rome, during the earliest period, in the King, and later in the consuls. In the year 387 A. U. C. (367 B. C.) a prætor (*prætor urbanus*) was created by the side of consuls; and jurisdiction in proceedings between Roman citizens (*qui inter cives jus dicit*) was assigned to him as a special jurisdiction. About the year 512 A. U. C. (242 B. C.) a second prætor, the so-called *prætor peregrinus*, was created to whom proceedings between non-citizens (*peregrini*) as well as proceedings between citizens and non-citizens were assigned (*qui inter peregrinos jus dicit, inter cives et peregrinos jus dicit*). In addition to the two prætors the *aediles curules* had a special jurisdiction in Rome in disputes of the market place (§ 87). In the provinces jurisdiction was in the hands of the prefects.

"These judicial authorities, like the other magistrates of Rome, possessed the *jus edicendi*, that is to say, the right to make binding enactments and to promulgate them. They did this by announcing, upon their entrance into their office, for the guidance of the public who sought justice, the principles which they proposed to observe in administering justice during their year in office. The most important of these edicts are those of the prætors. Our legal sources contained nothing but fragments of the *edictum prætoris urbani*, for which reason we restrict ourselves to these in our subsequent discussion.

"The beginnings of the edict go back to an early period of time, and it is as old as the office of the *prætor urbanus*. By virtue of the *imperium* belonging to the prætor, he could from remotest times appoint a court in every case, which was not regulated by the statutes enacted by the people (outside the law), as it might be needed; and he could instruct the *judex* appointed by him by way of commands, under what presuppositions and for what he should condemn the defendants. The *judex* was bound by this instruction (*formula*), which was the emanation from the power of command, which was contained in the prætorian *imperium;* and he did not have to inquire whether it was based upon a statute enacted by the people or not. He had merely to carry out these instructions; and he had only to investigate to see whether the pre-suppositions, which were set forth in the instructions, had happened or not; and to render his decision in accordance with the result of this investigation. In this way it was made possible for the prætor to fill in the gaps in the law by the administration of his *imperium* and to come half-way to give judicial validity to the claims, which arose out of the necessities of commerce and life, claims which according to the statutes enacted by the people, enjoyed no legal protection; and especially to grant new actions; to promise these in advance in his edict upon his entrance into office; and to establish in his edict *formulæ;* which were appropriate thereto. Numerous rights of action owe their existence to this. Furthermore, by virtue of his *imperium*, the prætor also had power to deny judicial enforcement to such provisions of the statutes enacted by the people as had become obsolete, or to join them to further pre-suppositions established by him. Finally since the reform of procedure introduced by the *lex Aebutia*, he also had to draft *formulæ* of action suitable for the claims which were based upon the statutes enacted by the people; and to set them forth in the edict. For this reason

absolutely different from that of his predecessors, the edict was as a matter of fact repeated by prætor after prætor, with only

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the edict necessarily underwent a considerable expansion. The jurist Papinian called these different purposes, which indeed are merely hinted at, the *supplere, corrigerer, adjuvare jus civile*, since he defines the law which is based on the prætor's edict as the *jus qoud prætores introduxerunt adjuvandi vel supplendi vel corrigendi juris civilis gratia propter utilitatem publicam.*

"The edict was a result of the official power of the prætor. It was promulgated by the prætor upon his entrance into office as the program of his activity; it was in force for his official jurisdiction and for his period of office. For the latter reason it was called the *edictum perpetuum* (*annuum*), in contradistinction to the *edicta repentina*, which were issued for purely temporary occasions. His edict was obligatory upon the prætor himself only since the *lex Cornelia* 687 A. U. C. (67 B. C.). At the expiration of his term of office it expired automatically, for which Cicero calls it a *lex annua*. His successor promulgated a new edict. It was a matter of course that in his edict he reiterated those provisions of his predecessors which had been found adequate. Thus a solid nucleus of successive edicts was built up, which constitute the chief part of these edicts, the so-called *edictum tralaticium*. The actually new part of the formally new edict was limited to additions of greater or less significance (*novæ clausulæ, nova edicta*).

"In such manner the prætorian edict formed a sort of codification of the law, which had practical validity, since only that could be regarded as having practical validity which had back of the power of the prætor as the upholder of his jurisdiction. This codification had the inestimable advantage of preserving on the one hand, the traditional law as far as it had proven itself adequate; and, on the other hand, of being able to meet the new demands of a progressive society very easily, because of its annual renewal. It is plain that on account of the difficulty of legislation by the *comitia*, the center of gravity of legislation for private law shifted over to the edict. The law which is based upon the edict is called *jus honorarium*, or *jus prætorium*, as the case might be. From the Roman point of view it is neither *lex* or *legis vice*. Its validity, in contradistinction to the *lex* is limited as to place to the jurisdiction of the official; and as to time, to his period of office. But it is really statutory law in the general sense, as discussed above, since it is in force only by virtue of the enactment of the official and not in the least as customary law.

"The time of greatest development of the edict lay in the period of the Republic. It is true that the old magistracies with their *jus edicendi* survived during the period of the Empire, but they at once came to be dependent upon the *princeps*. For this reason the edict became rigid; new provisions became rare, and were undertaken only in accordance with the approval of the *princeps* which were previously obtained. Hadrian caused a revision of all the edicts to be undertaken by the jurist Salvius Julianus, about which we have scanty information from reports of a much later period. As Justinian tells us, the Emperor, by means of a *senatus consultum* caused the formation of this revised edict, which included the edict of the *ædiles*, and the provincial edict as well as the prætorian edict. The legal character of the edict was not altered thereby however. It was still in force from that time on as the edict of the magistrate and not as a *senatus consultum*. This *senatus consultum* had an administrative significance only. It enacted a standard edict and it obliged the magistrates to proclaim this alone as their edict, and to obtain from higher authority approval of such amendments as might be contemplated by them. For this reason the edict from this time on

such changes and modifications as experience had shown to be necessary. It thus became the living voice of civil law. This edict with the commentaries which were written upon it, was one of the growing points of the Roman law.

By the specific provisions of the Articles of War the President has power to make regulations which he may modify from time to time in which he may prescribe the procedure including modes of proof in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals. Such regulations must not be contrary to the Articles of War or inconsistent with them, and they must be laid before Congress annually.[29] By virtue of this power the President has declared much of the mili-

is, in its content, only the expression of the will of the senate and the Emperor; while in form, it still remains the edict, that is to say, the law which proceeds from the office of the magistrate. But even under these conditions it is formally the prætor and not the senate who promises actions, exceptions, etc.

"From this edict, the content of which has now been fixed, and which in this sense is the *perpetuum edictum*, of Hadrian, there has been borrowed that which we now find in Justinian's codification as the edict. The newest and best attempt to restore the edict is that by Lenel: The *Edictum Perpetuum*, 1883, ed. II, 1907 (Bruns. 211 *et seq.*)" CZYHLARZ, INSTITUTIONEN DES RÖMISCHEN RECHTES, § 8. See also MUIRHEAD, HISTORICAL INTRODUCTION TO THE PRIVATE LAW OF ROME, 2 ed., Pt. III. Chap. II, § 49, pp. 238–42. MELVILLE, MANUAL OF THE PRINCIPLES OF ROMAN LAW, Pt. I, Chap. I, § 5, p. 24 *et seq.* WALTON, HISTORICAL INTRODUCTION TO ROMAN LAW, 2 ed., Chap. XXII. SALKOWSKI, INSTITUTES AND HISTORY OF ROMAN PRIVATE LAW (Whitfield's translation), Introduction, Pt. II, § 7, pp. 34–36. SOHM, INSTITUTES OF ROMAN LAW (Ledlie's translation), 3 ed., Pt. I, Chap. II, § 15, p. 73 *et seq.* KUHLENBECK, ENTWICKLUNGSGESCHICHTE DES RÖMISCHEN RECHTS, Bk. II, Chap. III, § 3, p. 219 *et seq.* GIRARD, SHORT HISTORY OF ROMAN LAW (translated by Lefroy and Cameron), Chap. II, § 11, 2 (II), p. 80 *et seq.* LEAGE, ROMAN PRIVATE LAW, 11 *et seq.* 2 CUQ, LES INSTITUTIONS JURIDIQUES DES ROMAINS, Bk. I, Chap. II (V), p. 31 *et seq.* ESMARCH, RÖMISCHE RECHTSGESCHICHTE, 3 ed., Bk. II, Chap. IV, §§ 93 *et seq.* VOIGT, RÖMISCHE RECHTSGESCHICHTE, § 19. For the revision and consolidation of the perpetual edict under Hadrian, see also MUIRHEAD, HISTORICAL INTRODUCTION TO THE PRIVATE LAW OF ROME, 2 ed., Pt, IV, Chap. I, § 58, pp. 289–91. SALKOWSKI, INSTITUTES AND HISTORY OF ROMAN PRIVATE LAW (Whitfield's translation), Introduction, Pt. II, § 8, IV, p. 45. KUHLENBECK, ENTWICKLUNGSGESCHICHTE DES RÖMISCHEN RECHTS, Bk. III, Chap. I, § 1, C, p. 293. VOIGT, RÖMISCHE RECHTSGESCHICHTE, § 84.

[29] MANUAL FOR COURTS-MARTIAL [U. S. ARMY] (corrected to April 15, 1917), paragraphs 198, 199; Thirth-eighth Article of War (REV. STAT. U. S., § 1342).

If the growing movement to confer upon the courts ample power over pleading, practice and procedure; and to reduce legislation on these points to the minimum, succeeds, our courts will have some resemblance to the prætor's court when he determined the formula which was submitted to the *judex*. The early common-law judges, before the day when their practice had stiffened by precedent, exercised a similar power, as Holdsworth sees it. See W. S. Holdsworth, "The Year Books," 22 L. QUART. REV. 360, 369.

tary law in advance. In the Manual for Courts-Martial the chapter on Evidence [30] prescribes the modes of proof which includes rules of admissibility for witnesses and other evidence. This chapter is not in the form of a statute but rather in the form of a text book. It refers to the Digest of the Opinions of the Judge-Advocate-General, to cases which have been decided by federal and state courts, to text writers, and to statutes. Principles are illustrated by hypothetical cases. We have here an instance in which at military law the President as Commander-in-Chief lays down in advance broad principles of law which are but a modification of the common-law rules of evidence, not for any specific case but for all cases which may arise in the future and which may involve the application of such principles.

V

In discussing the resemblances of military law to Roman law, no reference has been made to its content. There is but little in common between a criminal code which makes scourging and crucifixion its ordinary punishments and one which forbids punishment by flogging, branding, marking or tattooing; and which imposes death as a penalty, but without torture or degradation, except as conviction of crime, may amount to a declaration of an existing degradation. The early English Articles of War, no doubt, were much more savage in their nature than modern English or United States articles and more like Roman law, but, even for them, there is little need to invoke any theory of direct borrowing. It is quite likely that, in view of the relation of the King of England to his continental possessions, some continental ideas upon military law were embodied in the English Articles of War. It is probable that as far as he could, the King ordained the same Articles of War for his army whether in England or on the Continent, and whether it was raised in England or in Aquitaine. If the continental military codes influenced the content of the early English Articles of War and if they cause the slightest infusion of Roman ideas, it was probably the debased popular Roman law man and not the classic law.[31]

[30] MANUAL FOR COURTS-MARTIAL [U. S. Army] (corrected to April 15, 1917), paragraphs 194–289.

[31] Interesting collections of Military Ordinances and Codes are to be found in

Our problem, however, is not one of the content of military law but one of its form and its methods of growth. What explanation can we give of the origin of this alien intruder into our law? Why has military law burned what the common law has adored, and why has it adored what the common law has burned? Why has military law, in its method of development, differed from the common law and agreed with the Roman law, on every point?

The theory of direct borrowing has the same place in comparative law that Noah's Flood once had in geology. It is a first aid to all difficulties, and, if our knowledge is sufficiently limited, it will explain all our troubles. Sometimes, moreover, it is the correct theory as tested by further investigation into the facts. Shall we invoke it here? It is an explanation that is obvious and simple, but it gives no aid to the solution of this puzzle. The stream of *responsa* had ceased to flow and the prætor's edict had become petrified some three centuries before Justinian's compilation and a thousand years before any influence upon English military law could have been exerted. Those who administered military law probably had no idea of the method by which Roman law had grown. At the revival of the study of Roman law, the Digest was thought of rather as Justinian's legislation than of a summing up in an enucleated form, of the result of centuries of gradual growth.

Is this a case in which like causes have produced like results in different ages, separated in time by hundreds of years; and in different places, separated in space by hundreds of miles? In both cases we have an Aryan race of marked genius for law, and organized on a military basis; for Rome was a military state, and in England, military law existed solely for the government of the army. In both cases we have the administration of a formal technical law and not the administration of popular custom in a tribal assembly. In both cases we have the administration of this technical formal law by a court which is not a permanent court, and which is not a technically trained body organized

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WINTHROP, MILITARY LAW AND PRECEDENTS, 2 ed., appendices I to XVI inclusive; in GROSE, MILITARY ANTIQUITIES RESPECTING A HISTORY OF THE ENGLISH ARMY. Early codes are also given in whole or in substance in CLODE, THE ADMINISTRATION OF JUSTICE UNDER MILITARY AND MARTIAL LAW.

primarily for the purpose of adjudicating cases. In both cases the court does not know the law in theory, and frequently does not know it in fact. The key to the development of military law is probably to be found in the position of the Judge-Advocate-General. The fact that the Judge-Advocate-General, and not the commanding officer of the court-martial was the trained legal expert, has caused the Judge-Advocate-General to take the place in military law which in Roman law was occupied by the *jurisconsultus;* while the commanding officer who has power to convene the court-martial roughly takes the place of the prætor; and the court-martial itself takes the place of the *judex.*

Back of this is another question for the student of comparative law. Is the Roman method of declaring and developing law, the normal method of the Aryan when he rises above the tribal custom into technical law? The development of political authority in England caused a partial separation of powers. The very essence of military organization is a concentration of powers. The fundamental idea of the administration of government in Rome was the *imperium;* now concentrated in the person of the king; now scattered among the different high officers of Rome; and finally concentrated again in the hands of the emperor. Is it the concentration of military power in the hands of the President as Commander-in-Chief which has resulted in his exercise of authority to declare law in advance? Has the development of law in England, departed from the normal method that Rome followed because of its political and constitutional history? Has equity followed this distorted method of development of the common law because of its desire to follow the analogies of the common law except as far as this might be inconsistent with the peculiar and essential principles of equity? Is our enormous mass of judicial precedent and the sharp separation between the law which is made by legislation and the law which grows by judicial decision, a part of the price which we have to pay for democracy? Roman law developed in a manner more symmetrical and with better coördination than our own, although the symmetry of Roman law is more apparent than it is real. But Rome was at all times an autocracy although the autocratic power was sometimes put in commission among a number of different officers. Can we work out a means of developing our own law

so as to secure a comprehensive and symmetrical development like that of the Roman law and at the same time so as to preserve the life and vigor of an industrial democracy? Are coördination and coöperation between the legislative power and the judicial power inconsistent with free government? Is it possible to secure a centralization of administration which will give us a symmetrical development of our law, and at the same time to avoid such a centralization as will result in autocracy?

Democracy is entitled to the best of law. It needs it. Does a comparison of Roman law and of military law tend to show that after all we must elect between that which is most nearly ideal in its method of development and that which can develop in harmony with democratic institutions? It is to be hoped that we do not have to make this election. If possible, let us choose the advantages of both. To those of us who have been striving for a means of seeking a simpler, freer development of our law, these questions, however, present new complications. If we cannot secure a coördination between the legislative and the judicial, together with a comprehensive and symmetrical development of our law, and at the same time preserve our free government and our democracy, shall we not prefer our unwieldy jumble of judicial precedent and legislation to any other system of law however symmetrical, uniform and comprehensive it may be?

Many of us have for the last year and a half been teaching military law as a patriotic duty. May we not also learn from it a valuable lesson in comparative law?

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